

Sabah Inn Sdn Bhd v Fung Cheong Ming
(suing on behalf of the Sze Yi Association, West Coast, Sabah)

HIGH COURT (KOTA KINABALU) — CIVIL APPEAL NO K12-14 OF 2000
SULONG MATJERAIE J
12 AUGUST 2005

Landlord and Tenant — Deposit — Rental deposit — Whether rental deposit was refundable before delivery of vacant possession of premises

The premises owned by the respondent were subleased out to the appellant. In respect of the rental for the third to the seventh floors a rent deposit of RM60,000 was deposited and for the second floor a deposit of RM5,400 was likewise deposited. By a letter of offer the respondent agreed to renew the sublease for a final term of five years.

Before the commencement of the second period of two years the respondent and the appellant jointly appointed M/s CH Williams, Talhar & Wong (Sabah) Sdn Bhd ('Valuer') to value the market rent for the said premises. This was duly done whereby the Valuer confirmed that the open market rent for the premises was RM14,670 per month. But the parties failed to agree on the basis to be adopted for the revised rent and the appellant continued to pay the old rate of RM8,800 per month.

By a letter from the solicitors of the respondent the appellant was given two months grace period to vacate the premises upon the expiry of tenancy. The appellant in their defence made a counterclaim for an amount of RM64,500 paid as security deposit refundable on the expiration of the term of the sublease.

The sessions court ruled that appellant's counter claim was premature. Not being satisfied with the said decision, the appellant appealed to the High Court. The issue was whether the rental deposit was refundable before the appellant had delivered vacant possession of the premises.

Held, dismissing appeal with costs:

- (1) A term to be implied, as a legal incident of the kind of contractual relationship between the landlord and tenant that the parties must have intended to include it in the contract though it had not been expressly set out as such in the sublease agreement (see para 33). The sublease agreements imposed a contractual obligation unto the appellant not only to repair the premises before yielding the same over to the respondent but to compensate the respondent and fulfill all other contractual obligations envisaged under the agreements. As it was the accepted practice prevalent in Sabah that rental deposit was refunded

- A** only after the tenant had vacated and settled all accounts, such implied term would be essential to give business efficacy to the transaction. It was only reasonable for the respondent to retain the rental deposit upon the premises being vacated and all obligations of the appellant under the sublease agreements fulfilled (see para 34).
- B** (2) The court recognised that cl 1(1) of the memorandum of sublease might have been explicit in its terms that the rent deposit should be refunded on expiry of the terms but such clause ought not to be read in isolation without recognising the need to fulfill other contractual obligations duly imposed on to the appellant (see para 35).
- C** (3) The common trade and general practice prevalent in the relationship between the landlord and tenant ought to be applied to give business efficacy to the transaction. Though these terms might not have been found in the sublease in its explicit terms, but as seen from the above cited case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, the court can infer from the evidence that the parties must have intended to include it in the contract (see para 35).
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[Bahasa Malaysia summary]

- E** Premis yang dimiliki oleh responden telah di sub-pajak kepada perayu. Berkenaan dengan sewa untuk tingkat tiga hingga tujuh, satu deposit sewa sebanyak RM60,000 telah didepositkan dan untuk tingkat kedua satu deposit sebanyak RM5,400 juga telah didepositkan. Melalui sepucuk surat tawaran, responden telah bersetuju untuk membaharui pajakan kecil itu untuk satu terma terakhir selama lima tahun.
- F** Sebelum permulaan terma kedua selama dua tahun responden dan perayu telah bersama-sama melantik Tetuan CH Williams, Talhar & Wong (Sabah) Sdn Bhd ('Penilai') untuk menilai sewa pasaran untuk premis-premis tersebut. Ini telah pun dibuat di mana Penilai telah mengesahkan bahawa sewa pasaran terbuka untuk premis-premis tersebut adalah RM14,670 sebulan. Tetapi pihak-pihak gagal untuk bersetuju ke atas sewaan yang baru dan perayu telah meneruskan pembayaran jumlah sewa yang lama iaitu RM8,800 sebulan.
- G** Melalui sepucuk surat daripada peguam cara responden, perayu diberi dua bulan untuk mengosongkan premis tersebut pada tarikh tamat tempoh sewaan. Perayu dalam pembelaannya telah membuat tuntutan balas untuk jumlah RM64,500 yang telah dibayar untuk sekuriti deposit yang sepatutnya dipulangkan selepas tamat tempoh pajakan kecil.
- H** Mahkamah sesyen memutuskan bahawa tuntutan balas perayu adalah pramasa. Perayu tidak puas dengan keputusan itu dan merayu kepada Mahkamah Tinggi. Isu adalah sama ada deposit sewaan itu boleh dipulangkan sebelum perayu memberi hak milikan kosong premis itu.
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Diputuskan, menolak rayuan dengan kos:

- (1) Terma tersirat sebagai perkara undang-undang dalam satu perhubungan kontraktual di antara tuan tanah dan penyewa apabila pihak-pihak mesti bertujuan untuk mengambil kira perkara itu ke dalam kontrak walaupun ia tidak dinyatakan di dalam perjanjian pajakan kecil (lihat perenggan 33). Perjanjian pajakan kecil itu meletakkan satu obligasi kontraktual ke atas perayu bukan sahaja untuk membaiki premis sebelum menyerahkan semula premis kepada responden, tetapi juga untuk memberi pampasan terhadap sebarang kerugian responden dan juga melakukan semua obligasi kontraktual yang lain yang dinyatakan dalam perjanjian itu. Seperti amalan yang diterima sekarang di Sabah bahawa deposit sewaan dipulangkan hanya setelah penyewa telah mengosongkan premis dan menyelesaikan semua akaun-akaun, terma tersirat ini adalah penting untuk memastikan keberkesanan satu transaksi perniagaan. Ia adalah munasabah untuk responden memegang deposit sewaan itu sehingga premis telah dikosongkan dan semua obligasi perayu dalam perjanjian pajakan kecil itu dipenuhi (lihat perenggan 34).
- (2) Mahkamah sedar bahawa kl 1(1) memorandum pajakan kecil adalah jelas dalam terma-termannya dan deposit sewaan sepatutnya dipulangkan atas tarikh tamat terma-terma tetapi klausa seperti ini tidak sepatutnya dibaca secara tersendiri tanpa mengambil kira keperluan memenuhi obligasi-obligasi kontraktual yang lain yang diletakkan ke atas perayu (lihat perenggan 35).
- (3) Perdagangan biasa dan amalan am dalam perhubungan di antara tuan tanah dan penyewa sepatutnya digunakan untuk mencapai transaksi perniagaan yang efisien. Walaupun terma-terma tidak dinyatakan dalam pajakan kecil dengan jelas, tetapi seperti yang dinyatakan dalam kes *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, mahkamah boleh memutuskan dari keterangan bahawa pihak-pihak sememangnya bertujuan untuk mengambil kira perkara itu ke dalam kontrak (lihat perenggan 35).]

Notes

For cases on deposit generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 847–848.

Cases referred to

Liverpool City Council v Irwin & Anor [1977] AC 239 (refd)
Luxor (Eastbourne) Ltd & Ors v Cooper [1941] AC 108 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)

A Legislation referred to

Societies Act 1948

Philip Lee (Lee & Aziz) for the appellant.

Nooraihan bte Mohammad Ali (Yap Chin & Tiin) for the respondent.

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Sulong Matjeraie J:

BACKGROUND

C [1] On 22 February 2000 the learned sessions court judge ruled *inter alia* that the appellant's counter claim for the refund of RM65,400 as security deposit on the expiry of the term of the tenancy was premature and dismissed with costs for the respondent to be taxed unless agreed upon.

D [2] Not being satisfied with the said decision, the appellant appealed to the High Court against such part of the decision that decides that the counterclaim of the appellant was premature alleging that:

- E** (1) the learned judge erred in fact and in law when he ruled that the parties must have intended to include the implied term that the rental deposit is to be refunded only after the appellant has vacated the premises and settled all accounts and duly performed all its obligations under the sub-lease agreement (hereinafter referred to as 'the Agreement');
- F** (2) the learned sessions court judge misdirected himself in implying the term mentioned at (1) above as there was no evidence that the parties must have implied such terms based on the facts and evidence presented and in particular he failed, neglected or otherwise refused to consider or at all the appellant's written submission at pp 40–47 of the appeal record;
- G** (3) the learned sessions court judge ought to have allowed the counterclaim with the orders set out in para 4.1 of the appellant's Written Submission to the learned sessions court judge at pp 56–57 of the Appeal Record.

G [3] These three grounds of appeal are so closely related and interconnected that I feel it proper to deal with them as one rather than three separate and distinct points of appeal.

H BRIEF FACTS

I [4] The premises owned by the respondent were subleased out to the appellant. The respondent Mr Fung Cheong Ming is the public officer acting on behalf of Szi Yi Association of West Coast, Sabah, a duly registered society under the Societies Act (Act 13). They are the owners of a building known as Szi Yi Association Building at No 25, Jalan Pantai, Kota Kinabalu. The appellant had been the tenant of the second to seventh Floors of the said building from 1 May 1974 and the lease expired on 30 April 1994.

[5] Separate memoranda of subleases were signed: one was in respect of second floor of the building and the other was in respect of third, fourth, fifth, sixth and seventh floors thereof. In respect of the rental for the third to the seventh floors a rent deposit of RM60,000 was deposited and for the second floor a deposit of RM5,400 was likewise deposited.

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[6] By a letter of offer dated 31 March 1989 the respondent through its solicitors agreed to renew the sublease for a final term of five years with a rental payment of RM8,800 per month in respect of the second to seventh floors for the first period of three years and for the remaining two years the rental shall be reviewed and adjusted according to the then prevailing market value to be determined by a qualified valuer appointed and paid for by the parties.

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[7] Before the commencement of the second period of two years the respondent and the appellant jointly appointed M/s CH Williams, Talhar & Wong (Sabah) Sdn Bhd to value the market rent for the said premises. This was duly done whereby the Valuer confirmed that the open market rent for the premises was RM14,670 per month. But the parties failed to agree on the basis to be adopted for the revised rent and the appellant continued to pay the old rate of RM8,800 per month.

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[8] By a letter from the solicitors of the respondent dated 28 April 1994 the appellant was given two months grace period to vacate the premises upon the expiry of tenancy on 30 April 1994 subject to a payment of RM14,670 per month.

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[9] Disagreements and disputes arose as to whether the rental should be based on 'an empty shell' basis or to include renovation done, fixtures and fittings to name a few and this ended with a summons being issued against the appellant to pay the outstanding sum of RM170,220 on 31 October 1994. The appellant in their defence made a counterclaim for an amount of RM64,500 paid as security deposit refundable on the expiration of the term of the sublease. It was on this issue that the learned sessions court judge ruled that appellant's counter claim was premature and dismissed with costs to the respondent to be taxed unless agreed upon.

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[10] Matters not in dispute:

- (1) The sublease had expired on 30 April 1994;
- (2) The appellant had paid the respondent a total sum of RM65,400 as security deposit;
- (3) The appellant chose not to give *viva voce* evidence to substantiate their counterclaim on their argument that they have discharged both its legal and evidential burden of proof in respect of their counter claim;

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- A** (4) At the commencement of the proceedings before the sessions court, and at the time the order was handed down by the learned sessions court judge, ie 22 February 2000, the appellant have yet to move out of the premises;
- B** (5) The issue here is: 'whether the rental deposit is refundable before the appellant has delivered vacant possession of the premises'.

[11] Relevant provisions of the memorandum of sub lease that pertains to the deposit:

- C** Clause 1(1)

The lessees (appellant) hereby covenant with the lessors (respondent) 'to pay the monthly rent at the times and in the manner aforesaid without any deduction whatsoever and further to pay the lessors a rent deposit of RM60,000 which shall be refunded without interest on the expiration of the term or extended term save and except forfeiture herein provided; the said rent deposit of RM60,000 shall be paid in 12 equal monthly instalments of RM5,000 each as from 1 May 1974...

Clause 1(10)

- E** The lessees shall be at liberty to make such alterations, partitions and additions to the premises provided that any such alterations shall first be approved by the Koto Kinabalu Town Board and that such alterations shall be at the entire expense of the lessees and further that such alterations, *partitions or additions shall be removed by the lessees on the expiration of the sublease and to have the premises restored to its original condition at the entire expense of the lessies and to compensate the lessors for whatever damage that may be made to the premises.*
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[12] The issue is whether the rental deposit is refundable before the appellant has delivered vacant possession of the premises.

- G** **[13]** In determining the said issue, did the learned sessions court judge err in implying in the sublease agreements the term that rental deposit shall be refunded only after the appellant has delivered vacant possession of the premises to the respondent and has performed all its obligations under the agreements?

- H** **[14]** There was a suggestion by learned counsel for the appellant to rephrase the issue for the sake of clarity as seen in the appellant's reply outline submission at encl 18.1 am of the view that the issue as outlined above is clear enough and this was the issue in the mind of the learned sessions court judge when he deliberated on this case. Further in my mind, cognizance must be made to the fact that at the time when the decision was made, the appellant 'was still occupying the premises although the leases had expired in April 1994.' (see lines 9 and 10 of p 166 of the appeal record) and in fact made it clear to the respondent that it has no intention of vacating the premises (p 166 lines 11
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and 12 of the appeal record). In the circumstances the suggestion to rephrase is not acceptable.

[15] The appellant made it clear that in view of the clear, plain, express, specific and unambiguous provisions of the relevant clauses in respect of the sublease governing the refund of the rental deposit the application of any implied terms should be excluded. Effect must be given to the express provisions of those clauses governing the refund of rental deposit. As such it was argued that the court cannot rewrite the contract or audit the bargain between the parties but should instead hold them to the contract they had made for themselves by giving effect to the clear and unequivocal words. In other words the existence of specific provision for the refund of deposit overrides any implied terms incidental to the landlord and tenant relationship. When there are clear and specific clauses in the sublease there is no room for the court to imply any other implied terms incidental to the relationship between the landlord and tenant. Therefore in this instant case, the respondent is contractually bound to restore or refund the rent deposit on expiry of the sublease. Any failure to do so amounts to a breach of the sublease.

[16] The appellant submits further that whatever may be the practice in Sabah would be irrelevant consideration in construing clear and unambiguous clauses.

[17] Let us now examine the grounds of decision of the learned sessions court judge.

[18] To begin with, it was ruled that the issue of forfeiture due to default under the provision of cl 1(11) and 3(1) of the memorandum of sublease were irrelevant and all evidence and testimony pertaining to this were therefore ignored. I likewise will not dwell on it either.

[19] The matter before us is this: can the respondent withhold the RM65,400 rental deposit before the appellant has delivered vacant possession of the premises? The appellant said no, but the respondent said, yes they can. The appellant said look at the terms of the sublease, it is clearly stated that the rental deposit shall be refunded on the expiry of the term or extended term. The term expired on 30 April 1994. But the appellant did not move out on 30 April 1994. In fact they refused to move out alleging that they have the right to perpetual renewal of the sublease! In fact they remained in occupation of the premises without any payment or offer of payment to the respondent since May 1994 up to the date of hearing before the learned sessions court judge. This is however a separate issue as the respondent has since taken action before another sessions court judge for possession of the premises.

[20] It was pointed out to this court that before the learned sessions court judge, the respondent argued that it is an implied term of the subleases that the rental deposits are to be retained until the appellant has delivered vacant

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- A** possession of the premises and that the appellant has duly performed all their obligations under the sublease. It was contended that the appellant have yet to perform their obligations and or settle all outstanding accounts and outgoing in respect of the appellant's use and occupation of the premises. The contractual obligations of the appellant were as follows:
- B** (1) to pay the monthly rent in advance on the first day of each month;
- (2) to pay the enhanced quit rent and enhanced assessment or additional assessment or rates imposed;
- C** (3) to pay all charges in respect of telephones, water and electricity charges used on the premises;
- (4) to keep the interior and fixtures and fittings of the premises in good and tenantable repair and condition and in such repair to yield up the premises at the determination of the sublease;
- D** (5) to reinstate or restore the premises to its original condition at the expiry of the sublease and to compensate the respondent for whatever damages caused to the premises.

- E** [21] In the event of any breach of these contractual obligations the appellant suggests that the remedy would be to take separate action and that the retention of the deposit is not a lawful option for the simple reason that such condition was never incorporated in the sublease agreement. The learned sessions court judge agreed that there was nothing in the sublease agreement to say that the rental deposit can only be refunded after the appellant vacates the premises and had duly performed its contractual obligations. But, the learned sessions court judge suggests that the absence of such terms in the sublease agreement does not necessarily mean that the parties never intended them to be included in the agreement. What was the intention of the parties?
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- G** [22] The appellant chose not to give viva voce evidence and maintained that both its legal and evidential proof in respect of their counterclaim had been duly discharged.

- H** [23] The respondent on the other hand called three witnesses, PW1, MrFung Cheong Ming who had held various positions in the Sze Yi Association West Coast Sabah and this included Supervisory Chairman, Vice President, President, and had in depth knowledge of the 'goings on' in the respondent's Association. The second witness, PW2, Mr Tan Kwan Yong, is a clerk with the respondent. The third witness for the respondent was PW3 Chong Choon Kim, a registered Valuer who holds a Bachelor of Science Degree in Estate Management and an Associate member of the Royal Institute of Chartered Surveyors and also a Fellow of the Institute of Surveyors Malaysia. He had 22 years of experience in this field having been involved in the drafting of tenancy agreements and a partner in the company known as CH William, Talhar Wong.
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[24] After hearing the testimony of the three above mentioned witnesses of the respondent, the learned sessions court judge was of the view that the absence of clear terms in the event of any breach of the herein before mentioned contractual obligations need not necessarily mean the parties have never intended them to be included in the sublease agreement. The learned judge adds that some things are 'too plain' to be put in writing and quoted the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, where the Federal Court classified 'implied terms' under three types, namely:

- (1) the first and most important type is an implied term which the court infers from the evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract;
- (2) a term implied by operation of law;
- (3) a term implied by custom or usage of any market or trade which is reasonable, per Peh Swee Chin FCJ at p 169.

[25] Quoting the said case in extenso, the learned sessions court judge adds that the learned Peh Swee Chin FCJ further said thus at p 169:

Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common 'Oh, of course'.

[26] The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '... it can be predicted that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion simply means the desired result of the business in question'.

[27] The learned Peh Swce Chin FCJ went on to say at p 170 line E thus: 'If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'. The learned sessions court judge said that there was no doubt that the parties intended the deposits to be refunded without interest on expiration of the term or extended term unless they are forfeited but questioned as to under what circumstances can the respondent hold back the deposit on the

A expiry of the subleases. Learned counsel for the respondent then brought the attention of the learned sessions court judge to the decision of the House of Lords in *Liverpool City Council v Irvin & Anor* [1977] AC 239 and submitted that the retention of the deposit should be implied as being reasonable in the relationship between the landlord and tenant. The learned sessions court judge accepted the testimony of PW2 and in particular PW3, a registered Valuer of some '22 years standing' in respect the following:

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- (i) the accepted practice in Sabah was that the landlord holds on to the deposit until the tenant have vacated the premises, have settled all outstanding accounts and have carried out all its obligations;
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- (ii) the deposit was collected for the security of the landlord against any outstanding rent, utility charges and the cost of repairing or reinstating the premises in the event of the failure of the tenant to carry out all its obligations under the agreement;
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- (iii) it is an accepted term between the landlord and tenant in Koto Kinabalu and Sabah generally that the deposit will be retained until the tenant has vacated the premises and settled all accounts and have duly performed all its obligations under the agreement;
- E**
- (iv) it is only after the tenant has actually vacated the premises will the landlord be able to ascertain as to whether the tenant has fully performed its obligation in particular with respect to the covenant to repair or reinstate and to yield the premises in good tenantable condition;
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- (v) the appellant is bound by its covenant to repair or restore the premises at the determination of the sublease and to yield to the respondent the premises restored to its original condition.

[28] The learned sessions court judge accepted the evidence of PW3 that the accepted practice that the deposit is refunded only after the tenant has vacated the premises and settled all accounts and duly performed all its obligations under the agreement. *As* this was the normal practice in Sabah, it was his view that an inference can therefore be drawn that the contracting parties in this instant case must have intended to include this term in their agreement.

[29] Lye Lin Heng, the author of '*Landlord and Tenant*' Singapore Law Series on 'Security Deposit' said:

I The security deposit has become a common practice in the landlord and tenant relationship in recent years. It often takes the form of a sum of money (the equivalent of several months' rental) paid by the tenant to the landlord prior to the commencement of the tenancy. *The sum will be held by the landlord until the end of the tenancy* when it will be returned to the tenant *less deductions for expenses incurred by the landlord arising from any breach of the agreement by the tenant* (eg to cover expenses for repairs of damage caused by the tenant). Sometimes, the sum deposited may be

stated as 'liquidated damages' to ensure that the landlord can retain it without the necessity of proving actual losses. In such cases it may be regarded as an attempt to impose a penalty on the tenant, as the actual damage in such cases can be easily ascertained. (Emphasis added.)

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[30] Having taken all these factors into consideration the learned sessions court judge took the view that the respondent as the landlord has every right to hold back the deposits if he has a legitimate reason(s) to do so. To hold that the appellant is entitled, as of right, to a refund of the deposit at the expiry of the agreement without any regard to any breach of the contractual obligations on the part of the appellant is in his word to turn the agreement 'into a farce'. It was his view that by its very nature the rental deposit is a form of security, undoubtedly to ensure that the appellant pays for any damage done to the premises or settle any unpaid bills.

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[31] It could be seen that although the sublease agreement had expired in April 1994, at the time of the proceedings was taking place before the learned sessions court judge; the appellant was still occupying the premises and had made it clear that it had no intention of vacating the premises. We have now seen that in April 1995 the respondent took action for the possession of the premises, an action being commenced in Sessions Court I.

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[32] It was the finding of the learned sessions court judge that the only 'possible or reasonable' consideration that can be given is that the refund would only be made after the appellant has delivered vacant possession of the premises and it had performed all its obligations under the sublease agreement for in any event, unless and until the appellant has vacated the premises, rent would continue to be payable in which case it can be expected that security deposits be kept by the respondent. As such it was the view of the learned sessions court judge that the first test of the first type of implied term as envisaged in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* has been satisfied in that the respondent has succeeded in showing that the parties must have intended to include the implied term. Further having regard to the contractual obligations of the appellant under the sublease agreements and that it is the accepted practice in Sabah that the rental deposit is refunded only after the tenants had vacated the premises and had settled all accounts he was satisfied that the implied term was necessary to give business efficacy to the transaction. It was his finding therefore that the counterclaim was premature and accordingly dismissed the same with costs to be taxed unless agreed.

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[33] I have gone through the entire grounds of decision of the learned sessions court judge and I have no reason to differ from the decision he has arrived at. After having heard the arguments from counsel for the appellant as well as the counsel for the respondent, and upon pursuing the authorities offered to this court, I agree that there is to be implied, as a legal incident of the kind of contractual relationship between the landlord and tenant, that the parties must have intended to include it in the contract though it has not been expressly set out as such in the sublease agreement.

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- A** [34] In my considered view, the sublease agreements imposed a contractual obligation on to the appellant not only to repair the premises before yielding the same over to the respondent but to compensate the respondent and fulfill all other contractual obligations envisaged under the agreements. As it is the accepted practice prevalent in Sabah that rental deposit is refunded only after the tenant had vacated and settled all accounts, I agree that such implied term would be essential to give business efficacy to the transaction. It is only reasonable for the respondent to retain the rental deposit upon the premises being vacated and all obligations of the appellant under the sublease agreements fulfilled.

- C** [35] This court recognises that cl 1(1) of the memorandum of sublease may have been explicit in its terms that the rent deposit should be refunded on expiry of the terms but in my view such clause ought not to be read in isolation without recognising the need to fulfill other contractual obligations duly imposed on to the appellant. These are not extraneous terms plucked from thin air but are the terms found within the four corners of the same sublease. The common trade and general practice prevalent in the relationship between the landlord and tenant ought to be applied to give business efficacy to the transaction. Though these terms may not have been found in the sublease in its explicit terms, but as seen from the above cited case of *Sabahumi (Sondakan) Sdn Bhd v Datuk Yap Pak Leong* the court can infer from the evidence that the parties must have intended to include it in the contract. The learned sessions court judge have made a finding after hearing testimony from the witnesses offered by the respondent and for obvious reason it is not proper for this court to contradict such finding for no opportunity had been afforded to it to hear these witnesses. This court must be slow to disturb the factual findings of a trial judge unless I am convinced that his decision or his ‘ratio decidendi’ was manifestly wrong or was clearly against the weight of evidence.

- G** [36] The contractual obligations imposed on to the appellant under the sublease are not only explicit but well-defined and unequivocal. The duties the appellant had to perform before yielding up the premises include, ‘if alteration, partitions, additions are made, these shall be removed upon expiry and to have the premise restored to its original condition at the entire expense of the appellant, and to compensate for whatever damage that may be made to the premises. (Emphasis added.)

- H** [37] It is not appropriate therefore in my view that a clause in the sublease agreement ought to be read in isolation without recognizing the need to fulfill other contractual obligations duly imposed on to the appellant. In the result, I concur with the decision of the learned sessions court judge and would accordingly dismiss the appeal with costs to be taxed.

Appeal dismissed.

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Reported by Peter Ling